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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COX, CASTLE & NICHOLSON, LLP, Plaintiff and Respondent, v. DAVID WAN et al., Defendants and Appellants	B262017 (Los Angeles County Super. Ct. No. BC553213)

APPEAL from judgments of the Superior Court of Los Angeles County, Joseph R. Kalin, Judge. Reversed and remanded with instructions.

Lipeles Law Group, Kevin A. Lipeles, Thomas H. Schelly and Julian Bellenghi for Defendants and Appellants.

Cox, Castle & Nicholson, Kenneth B. Bley and Charles E. Noneman for Plaintiff and Respondent.

INTRODUCTION

Plaintiff and respondent, the law firm of Cox, Castle & Nicholson, LLP (plaintiff), represented defendants and appellants David Wan and Si Lau (defendants) in a civil action filed against them. When plaintiff did not receive full payment of its attorney fees for legal services rendered in defense of that action, it filed a complaint against defendants for breach of contract, payment for services performed, open book account, and account stated. In a separate cause of action, plaintiff sought to compel arbitration pursuant to the arbitration clause in an engagement agreement between the parties. In addition, plaintiff designated an arbitrator to preside over the requested arbitration. Plaintiff sought both money damages and an order compelling arbitration.

When defendants did not timely respond to plaintiff's complaint, their defaults were entered. Defendants then moved for relief from default under Code of Civil Procedure section 473, subdivision (b) (motion to vacate),[1] claiming excusable neglect. The trial court denied defendants' motion and entered money judgments against them.

On appeal from the judgments, defendants contend the trial court lacked subject matter jurisdiction over the fee dispute because plaintiff's cause of action seeking to compel arbitration deprived the trial court of jurisdiction over the merits of the fee dispute. Defendants also assert the trial court abused its discretion by not granting relief from default. They argue that when plaintiff rejected their request to set aside their defaults voluntarily, they promptly moved to set them aside. Defendants additionally contend plaintiff's request for arbitration was confusing and misleading, and one of them had a limited understanding of English.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

We hold that because plaintiff's cause of action to compel arbitration admitted the existence of a binding agreement to arbitrate the fee dispute, the trial court's jurisdiction over the merits of plaintiff's claims was initially limited to a determination of the gateway issue of arbitrability. But even assuming, arguendo, the trial court did have jurisdiction over the merits of the fee dispute, plaintiff was nevertheless estopped from seeking default money judgments against them because plaintiff judicially admitted in its complaint that the fee dispute was subject to binding arbitration and defendants relied to their detriment on that admission.[2] We therefore reverse the judgments.

BACKGROUND

A. Engagement Agreement and Arbitration Clause

On July 30, 2014, plaintiff filed its complaint against defendants. Plaintiff alleged it was a limited liability partnership engaged in the practice of law in California and that in September 2010, defendants jointly retained plaintiff as their legal counsel in a dispute arising out of the activities of Magnus Sunhill Group, LLC (Magnus action). Members and investors of that group had sued defendants.

Plaintiff and defendants entered into a written engagement agreement (the agreement) which contained an arbitration clause. The arbitration clause provided: "By signing this Agreement, we both agree that, in the event of any dispute or claim arising out of or relating to this Agreement, our relationship, our charges, or our services, including but not limited to disputes or claims regarding professional malpractice, errors or omissions, breach of contract, breach of fiduciary duty, fraud, or violation of any statute . . . , SUCH DISPUTE OR CLAIM SHALL BE RESOLVED BY SUBMISSION TO FINAL AND BINDING ARBITRATION IN LOS ANGELES COUNTY,

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[2] Because, as explained below, we resolve this matter on jurisdictional and estoppel grounds, we do not reach defendants' abuse of discretion contention.

CALIFORNIA, BEFORE A RETIRED JUDGE OR JUSTICE. BY AGREEING TO ARBITRATE, YOU WAIVE ANY RIGHT YOU HAVE TO A COURT OR JURY TRIAL." The agreement also provided notice of defendants' statutory arbitration rights relating to attorney fees disputes. (Bus. & Prof. Code, § 6200 et seq.)

In the agreement, defendants agreed to pay plaintiff for legal services rendered and costs incurred in connection with its services rendered in the Magnus action and ten percent interest per year on any unpaid, overdue invoices. Plaintiff rendered legal services for defendants continuously from September 2010 through May 2012. Some ancillary services were performed during August 2012. Plaintiff billed defendants a total of $311,966.63 for attorney fees and related costs, of which only $37,441.25 was paid, leaving an unpaid balance of $274,525.23, excluding interest. Plaintiff repeatedly demanded defendants pay the outstanding balance, but defendants failed to do so. Prior to filing its complaint, plaintiff provided defendants in April 2014 with notice of their statutory arbitration rights under Business and Professions Code section 6201. Defendants did not timely respond to that notice, thereby waiving their statutory rights to arbitrate the fee dispute.

B. Plaintiff's Complaint

Plaintiff sued defendants asserting four collection causes of action: breach of written contract, common count for payment for services rendered, open book account, and account stated. In the fifth cause of action, plaintiff sought an order compelling arbitration, alleging, "The [agreement] between the Plaintiff and the Defendants provides, inter alia, that in the event of any dispute or claim arising out of the [agreement], any such dispute shall be resolved by submission to final and binding arbitration in Los Angeles County before a retired judge or justice to be mutually agreed upon by the parties, or if the parties cannot agree on a retired judge or justice, then each side will select a neutral judge or justice who will jointly select a neutral arbitrator, who will act as the sole arbitrator. [¶] Plaintiff hereby selects The Hon. John Zebrowski (Ret.) to serve

as the arbitrator to hear this dispute, or if Mr. Zebrowski is unavailable, such other retired judge or justice as the Plaintiff may hereafter designate ('Plaintiff's Designee'). If Plaintiff's Designee is not acceptable to the Defendants, as required under the terms of the Engagement Agreement, then the Defendants need to select a retired judge or justice ('Defendants' Designee') to serve as the arbitrator who, if unacceptable to the Plaintiff, shall with the Plaintiff's Designee select a retired judge or justice to serve as the sole arbitrator to hear this dispute."

In its prayer for relief, plaintiff requested monetary damages on the first four causes of action. On the fifth cause of action, plaintiff requested "an order that this dispute be referred to arbitration before a retired judge or justice as required by the" parties' written agreement.

C. Entry of Default

On September 19, 2014, plaintiff filed proofs of service of the summons and complaint on defendants. The proof of service on defendant Lau stated that he was personally served on August 26, 2014. The proof of service on defendant Wan indicated that on August 26, 2014, he was served at his place of business when the process server left the summons and complaint with a front desk receptionist. Neither defendant filed a response to the summons and complaint within 30 days of service.

On October 22, 2014, plaintiff requested entry of defendants' defaults and their defaults were entered the next day. On November 20, 2014, Judge Terry A. Green issued an order to show cause why sanctions should not be imposed on plaintiff for failure to proceed with obtaining default judgments. On November 24, 2014, plaintiff served the entered defaults on defendants by mail. On November 26, 2014, plaintiff served the notice of the order to show cause hearing on defendants. The default judgments, however, were not entered until January 26, 2015, following the hearing on defendants' motion to vacate their defaults discussed below.

D. Motion to Vacate

On December 19, 2014, defendants filed their motion to vacate. They argued that their failure to timely respond to the complaint was the result of excusable neglect under section 473, subdivision (b), but did not claim that they were entitled to mandatory relief under that provision. Defendants and their counsel, Stephen Bucklin of the Lipeles Law Group, submitted declarations in support of the motion. Defendant Lau declared that he did not believe he was properly served with the summons and complaint, although he acknowledged receiving the entry of default. Lau further declared he was confused and misled by plaintiff's fifth cause of action.[3] Defendant Wan, who had a limited understanding of English, also declared that he did not believe he was properly served and that he was confused and misled by plaintiff's fifth cause of action.[4]

Attorney Bucklin, who was defendants' appellate counsel in the Magnus action, declared that he contacted an attorney at the plaintiff law firm in early November 2014 regarding the firm's case file in the Magnus action. The attorney at the firm with whom attorney Bucklin spoke did not inform him at that time that a complaint had been filed against defendants. Attorney Bucklin learned of the entry of the defaults only after defendants informed him of them. Attorney Bucklin thereafter asked the attorney at the plaintiff law firm to voluntarily set aside the defaults, but plaintiff refused. Attorney Bucklin also noted that, despite the significant amount of attorney fees billed in the

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[3] Defendant Lau declared: "I . . . did not understand how the arbitration procedure in the retainer agreement was supposed to work. I did not understand that [plaintiff] was going to take my default in this case. I thought that the case was going to go to fee arbitration because that is one of the types of arbitration referred to in the retainer agreement."

[4] Defendant Wan declared: "The complaint states in the fifth cause of action that defendants 'need to select a retired judge or justice . . . to serve as arbitrator . . .' . . . I did not know what this meant and did not know what to do to select such a person. [¶] . . . [¶] I . . . did not understand how the arbitration procedure in the retainer agreement was supposed to work."

Magnus action, plaintiff had filed only six documents on defendants' behalf. He also suggested that plaintiff's services may have been inadequate. In addition to their motion to vacate, defendants lodged a proposed answer to the complaint which consisted of a general denial and a number of affirmative defenses.

In opposition to the motion to vacate, plaintiff argued defendants proffered no evidence of excusable neglect or mistake. Plaintiff relied on the proofs of service of the summons and complaint as evidence that defendants had been validly served. Plaintiff contended defendants' belief that service was inadequate, their language limitations, and their confusion as to the arbitration cause of action were not evidence of a mistake warranting relief.

E. Hearing on Motion to Vacate

On January 26, 2015, the trial court, Judge Joseph Kalin presiding, heard defendants' motion to vacate and the order to show cause regarding plaintiff's failure to obtain default judgments. No court reporter was present. The trial court denied defendants' motion in a minute order that stated, "The Court, having read and considered the documents filed and all oral argument, denies the Motion of Defendants David Wan and Si Lau [for relief] from Default and Default Judgment." The trial court subsequently entered default judgments against each defendant that awarded damages in the amount of $274,525.28 with interest of $85,184.53 against each defendant. The trial court also awarded plaintiff costs against each defendant. Defendants timely appealed the default judgments.

DISCUSSION

A. Subject Matter or Gateway Jurisdiction

1. Contentions

Defendants contend the trial court lacked subject matter jurisdiction over the merits of the fee dispute because, in its fifth cause of action, plaintiff admitted the existence of a binding agreement to arbitrate the fee dispute and affirmatively sought an order compelling arbitration of that dispute and appointing an arbitrator. In its respondents brief and in its supplemental letter brief on the jurisdiction issue,[5] plaintiff contends, notwithstanding its fifth cause of action to compel arbitration, defendants waived their statutory right under Business and Professions Code section 6201 to arbitration by not responding to the notice of that statutory right and their contractual right to arbitration by not asserting that right in the trial court.

2. Legal Principles

a. Arbitration

"The California Arbitration Act (CAA; Code Civ. Proc. § 1280 et seq.) is a comprehensive, detailed statutory scheme applicable to all civil disputes based on the strong public policy in favor of arbitration as a quick and relatively inexpensive means of dispute resolution. (*Schatz* [*v. Allen Matkins Leck Gamble & Mallory LLP* (2009)] 45

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[5] Following our order resubmitting this matter, we requested supplemental letter briefs from the parties on the jurisdiction issue and whether plaintiff was estopped from seeking default money judgments against defendants by its judicial admission that the dispute was subject to binding arbitration and its affirmative request to compel arbitration and appoint an arbitrator.

Cal.4th [557,] 564; *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 983 [12 Cal.Rptr.3d 287, 88 P.3d 24] (*Aguilar*).)" (*Rosenson v. Greenberg Glusker Fields Claman & Machtinger* (2012) 203 Cal.App.4th 688, 692-693.) Sections 1281[6] and 1281.2[7] govern petitions to compel arbitration and they "reflect a '"strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution."' (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 [10 Cal.Rptr.2d 183, 832 P.2d 899], quoting *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322 [197 Cal.Rptr. 581, 673 P.2d 251] (*Ericksen*).) When the parties to an arbitrable controversy have agreed in writing to arbitrate it and one has refused, the court, under section 1281.2, must ordinarily grant a petition to compel arbitration." (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 25-26.)

"[A]n arbitrator has the power to decide an issue only if the parties have authorized the arbitrator to do so. Because parties frequently disagree as to whether a particular dispute is arbitrable, courts play a limited threshold role in determining 'whether the parties have submitted a particular dispute to arbitration, i.e., the "question of arbitrability."' (*Howsam v. Dean Witter Reynolds, Inc*. (2002) 537 U.S. 79, 83 [154 L.Ed.2d 491, 123 S.Ct. 588], italics omitted (*Howsam*).) [¶] '"[Q]uestion[s] of arbitrability"' are limited to a narrow range of gateway issues. They may include, for example, 'whether the parties are bound by a given arbitration clause' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of

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6 Section 1281 provides: "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."

7 Section 1281.2 provides in pertinent part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists . . . ."

controversy.' (*Howsam, supra,* 537 U.S. at p. 84; see *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, 452 [156 L.Ed.2d 414, 123 S.Ct. 2402] (plur. opn. of Breyer, J.) (*Bazzle*).) Courts generally presume that so-called 'gateway dispute[s]' are '"for judicial determination [u]nless the parties clearly and unmistakably provide otherwise."' (*Howsam, supra,* at p. 83.)" (*Garden Fresh Restaurant Corp. v. Superior Court* (2014) 231 Cal.App.4th 678, 684.)

"'"A right to compel arbitration is not . . . self-executing. If a party wishes to compel arbitration, he must take active and decided steps to secure that right, and is required to go to the court where the [other party]'s action [at law] lies." (*Gunderson v. Superior Court* (1975) 46 Cal.App.3d 138, 143 [120 Cal.Rptr. 35].) Consequently, the party seeking to enforce the contractual arbitration clause must file the section 1281.2 petition in the action at law (or raise it as an affirmative defense in the answer) or else the right to contractual arbitration is waived. (*Id*. at p. 144; *Kustom Kraft Homes* [*v. Leivenstein* (1971)] 14 Cal.App.3d [805,] 811, 92 Cal.Rptr. 650**;** see also § 1281.5.)" (*Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 44-45.)

A judicial proceeding to compel arbitration, whether by way of a petition to compel arbitration under section 1281.2 or a cause of action to compel arbitration, constitutes a suit in equity to compel specific performance of an agreement to arbitrate. "It is well settled that '[a] proceeding to compel arbitration is in essence a suit in equity to compel specific performance of a contract.' (*Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 479 [121 Cal.Rptr. 477, 535 P.2d 341] (*Freeman*).)" (*Brodke v. Alphatec Spine Inc.* (2008) 160 Cal.App.4th 1569, 1574.)

b. Subject Matter Jurisdiction

Our Supreme Court has defined subject matter jurisdiction as follows: "Subject matter jurisdiction . . . is the power of the court over a cause of action or to act in a particular way." (*Greener v. Workers' Comp. Appeals Bd*. (1993) 6 Cal.4th 1028, 1035; accord, *Dial 800 v. Fesbinder, supra,* 118 Cal.App.4th at p. 42.) We review an issue

concerning a trial court's subject matter jurisdiction de novo. (*Robbins v. Foothill Nissan* (1994) 22 Cal.App.4th 1769, 1774.) Because the issue of lack of subject matter jurisdiction cannot be waived, it can be raised at any time, including for the first time on appeal. "[Subject matter jurisdiction] cannot be waived by the parties to the litigation. (See *Harrington v. Superior Court* (1924) 194 Cal. 185, 188 [228 P. 15] ['Jurisdiction of the subject matter cannot be given, enlarged or waived by the parties. . . . "[W]here the jurisdiction of the court as to the *subject matter* has been limited by the constitution or the statute the consent of parties cannot confer jurisdiction."'].) Indeed, a judgment entered by a court without subject matter jurisdiction is void, and may be '"attacked anywhere, directly or collaterally, by parties or by strangers."' (*Marlow v. Campbell* (1992) 7 Cal.App.4th 921, 928 [9 Cal.Rptr.2d 516]; see *Saffer v. JP Morgan Chase Bank, N.A.* (2014) 225 Cal.App.4th 1239, 1246 [171 Cal.Rptr.3d 111] ['Subject matter jurisdiction may be raised for the first time on appeal. . . . In addition, an alleged lack of subject matter jurisdiction must be addressed whenever it comes to a court's attention.' (citation omitted)].)" (*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 143.)

3. Analysis

In its supplemental letter brief, plaintiff agreed that, if it had filed a stand-alone petition to compel arbitration under section 1281.2, the trial court's jurisdiction would have been limited to a determination of the gateway issue of arbitrability. Presumably, plaintiff would therefore also agree that, if it had styled its fifth cause of action as a petition to compel arbitration under section 1281.2, the trial court's jurisdiction would have been similarly limited and would not have extended to a determination of plaintiff's requests for entry of default judgments.

As explained above, plaintiff affirmatively invoked the trial court's jurisdiction to determine the gateway issue of arbitrability by seeking in its fifth cause of action an order compelling arbitration of its fee dispute with defendants. Although plaintiff did not label

its fifth cause of action as a "petition" or expressly allege that it was seeking the order to compel arbitration under the authority of section 1281.2, that is the only statutory provision that would have enabled the trial court to determine the arbitrability issue and enter the requested order. Under the previously cited authorities, once the request to compel arbitration was filed, the trial court's jurisdiction was initially limited to determining whether the parties' fee dispute was subject to a binding agreement to arbitrate, i.e., once plaintiff affirmatively pleaded that the arbitrator, not the trial court, had exclusive jurisdiction over the parties' fee dispute, it was incumbent upon the trial court to determine whether that allegation was true. Therefore, unless and until that gateway issue was determined, the trial court could not make merits-based determinations on plaintiff's damage causes of action. Accordingly, by entering the default judgments against defendants, the trial court exceeded its jurisdiction because, as plaintiff admitted in its pleading, the issue of whether plaintiff was entitled to recover attorney fees from defendants was subject to the jurisdiction of the arbitrator selected pursuant to the terms of the arbitration clause.

Plaintiff's contention that defendants somehow waived the right to arbitrate by their inaction is meritless. Although defendants may have waived their statutory rights to arbitrate the fee dispute under Business and Professions Code section 6201, they did nothing to support the conclusion that they waived their contractual arbitration rights. Indeed, once plaintiff filed its fifth cause of action admitting the existence of a binding arbitration agreement and seeking an order to compel arbitration under that agreement, defendants were not required to separately demand arbitration because the issue was already framed for determination by the trial court in the fifth cause of action. Moreover, because plaintiff took their defaults, defendants were unable to take any action in the trial court concerning plaintiff's claims against them without first successfully vacating those defaults. And, although defendants did not affirmatively raise the subject matter jurisdiction issue in the trial court by asserting the fee dispute was within the exclusive

jurisdiction of the arbitrator, as explained above, subject matter jurisdiction is never waived and can be raised for the first time on appeal.

B. Judicial Admission and Estoppel

1. Contentions

In our request for supplemental briefing, we asked the parties to address whether plaintiff was estopped from seeking default judgments against defendants by the judicial admission in its complaint that the fee dispute was subject to the exclusive jurisdiction of the arbitration forum. In its letter brief, plaintiff contends that defendants' proposed answer generally denied the allegations of the complaint, including the allegation that the fee dispute was subject to the exclusive jurisdiction of the arbitration forum. According to plaintiff, because defendants denied the allegations concerning binding arbitration, those allegations could not constitute binding judicial admissions.

2. Legal Principles

a. Judicial Admissions

"Judicial admissions may be made in a pleading, by stipulation during trial, or by response to request for admission. [Citations.] Facts established by pleadings as judicial admissions '"are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her." [Citations.] "'[A] pleader cannot blow hot and cold as to the facts positively stated.'" [Citation]' [Citation.] [¶] Not every document filed by a party constitutes a pleading from which a judicial admission may be extracted. Code of Civil Procedure section 420 explains that pleadings serve the function of setting forth 'the formal allegations by the parties of their respective claims and defenses, for the judgment of the Court.' [Citation.] 'The pleadings allowed in civil actions are

complaints, demurrers, answers, and cross-complaints.' [Citation.] When these pleadings contain allegations of fact in support of a claim or defense, the opposing party may rely on the factual statements as judicial admissions. [Citation.]" (*Myers v. Trendwest Resorts, Inc*. (2009) 178 Cal.App.4th 735, 746.)

b. Judicial Estoppel

"'"'"Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] *The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies.* [Citation.] Application of the doctrine is discretionary.'" [Citation.] The doctrine applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." [Citations.]' (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987 [12 Cal.Rptr.3d 287, 88 P.3d 24], italics added (*Aguilar*); see also *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422 [30 Cal.Rptr.3d 755, 115 P.3d 41] (*MW Erectors*).)" (*People v. Castillo* (2010) 49 Cal.4th 145, 155.)

"[The judicial estoppel] doctrine rests on the principle that litigation is not a war game unmoored from conceptions of ethics, truth, and justice. It is quite the reverse. Our adversarial system limits the affirmative duties owed by an advocate to his adversary, but that does not mean it frees him to deceive courts, argue out of both sides of his mouth, fabricate facts and rules of law, or seek affirmatively to obscure the relevant issues and considerations behind a smokescreen of self-contradictions and opportunistic flip-flops." (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 558.)

c. Equitable Estoppel

"'"The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury."' (*City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, 279 [52 Cal Rptr.3d 114, 147 P.3d 1037] (*Goleta*), quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488 [91 Cal.Rptr. 23, 476 P.2d 423] (*Mansell*).)" (*People v. Castillo, supra*, 49 Cal.4th at p. 155, fn. 10.)

As explained by the court in *Brinkley v. Monterey Financial Services, Inc.* (2015) 242 Cal.App.4th 314, the doctrine of judicial estoppel is similar to the related doctrine of equitable estoppel in that both doctrines are grounded in notions of equity and fair play. "[The defendant] has argued in the trial court and on appeal that [certain arbitration procedures] apply to any arbitration of the underlying dispute. [The defendant] has thus made a judicial admission that the [arbitration procedures], including the fee provisions set forth in those procedures, apply to any arbitration of its dispute with [the plaintiff]; [the defendant] may therefore be estopped from arguing otherwise at a later point in time. (See *Westway Construction, Inc. v. Benton County* (2006) 136 Wn.App. 859, 868 [151 P.3d 1005] ['The essence of judicial estoppel is the same [as equitable estoppel] in that the party to be estopped must be asserting a position that is inconsistent with an earlier position.']; see also *American Title Ins. Co. v. Lacelaw Corp*. (9th Cir. 1988) 861 F.2d 224, 227 [statements of fact contained in a brief may be considered admissions of the party in court's discretion].)" (*Id*. at p. 345.)

Although judicial estoppel and equitable estoppel are rooted in the same equitable concepts, there is an important distinction between the two doctrines. "The doctrine of

judicial estoppel is designed to protect the integrity of the legal system as a whole, and does not require a showing of detrimental reliance by a party. (*Aguilar, supra*, 32 Cal.4th 974, 986-987; *MW Erectors, supra*, 36 Cal.4th 412, 422.)" (*People v. Castillo, supra,* 49 Cal.4th at p.156.)

3. Analysis

Plaintiff's reliance on defendants' proposed answer in support of its contention that the arbitration allegations in the fifth cause of action were not binding judicial admissions is misplaced. Although that answer was *lodged* with the trial court when defendants filed their motion to vacate the defaults, it was not *filed* in the trial court because the motion to vacate was denied. Thus, defendants did not deny that arbitration was the exclusive forum for resolution of the fee dispute. To the contrary, because of the entry of the defaults, defendants were procedurally prevented from opposing plaintiff's request for an order compelling arbitration. As a result, plaintiff's admission that arbitration was the exclusive forum within which to resolve the fee dispute was undisputed based on the record before us, and plaintiff was therefore bound by it in the trial court.

Moreover, whether defendants denied the allegations concerning the exclusive jurisdiction of the arbitration forum is irrelevant to the issues of judicial and equitable estoppel, which are predicated on plaintiff's affirmative representation that it agreed to resolve the fee dispute in binding arbitration, not in the trial court. Under the doctrine of judicial estoppel, that representation would have estopped plaintiff from seeking to enter default judgments against defendants if, by taking that position, plaintiff derived some advantage or benefit in the litigation. Under the doctrine of equitable estoppel, that same representation would have estopped plaintiff from seeking to enter the default judgments if defendants relied to their detriment on it.

In their declarations in support of the motion to vacate the defaults, each defendant stated he was confused and misled by the arbitration demand and plaintiff's selection of

an arbitrator to resolve the fee dispute, each believing the fee dispute would be resolved in binding arbitration, not the trial court. That testimony supported a reasonable inference that defendants did not timely respond to the complaint in the trial court—and, as a result, had their defaults taken—based on the reasonable but mistaken belief that plaintiff had agreed to arbitrate the fee dispute. Accordingly, plaintiff derived a benefit from its arbitration cause of action by triggering defendants defaults, thereby preventing them from opposing the arbitration demand; and, for purposes of equitable estoppel, defendants relied to their detriment on plaintiff's representation by failing to timely respond to the complaint. Plaintiff was therefore estopped from thereafter seeking to enter default judgments against defendants.

DISPOSITION

The order denying the motion to vacate and the default judgments are reversed and the matter is remanded to the trial court with instructions to enter a new order granting the motion to vacate defendants' defaults. Defendants shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KUMAR, J.*

I concur:

BAKER, J.

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* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

I respectfully dissent. First, I do not believe the arbitration cause of action divested the trial court of subject matter jurisdiction to enter the defaults. Nothing precluded plaintiff from pursuing its claims in court despite the existence of an arbitration agreement. (*Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1795; accord, *Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 44; *Spence v. Omnibus Industries* (1975) 44 Cal.App.3d 970, 975.) Furthermore, the arbitration claim did not state a cause of action. There is no allegation defendants refused to arbitrate their dispute. Thus, the arbitration cause of action has not yet accrued. (*Spear v. Caifornia State Auto. Assn.* (1992) 2 Cal.4th 1035, 1042; *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 479.)

Second, in my view, the record is inadequate for us to find an abuse of discretion by the trial court when it denied the motion to set aside the defaults. Defendants have failed to provide us with a reporter's transcript or a suitable substitute of the hearing on the motion to set aside the default. In numerous situations, appellate courts have refused to reach the merits of an appellant's claim because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 273-274 [transfer order]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [attorney fee motion hearing]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 (lead opn. of Grodin, J.) [new trial motion hearing]; *In re Kathy P.* (1979) 25 Cal.3d 91, 102 [hearing to determine whether counsel was waived and the minor consented to informal adjudication].)

Third, based on the record provided, I do not believe the trial court abused its discretion in denying the motion to set aside the default. The trial court reasonably could

have concluded defendants, David Wan and Si Lau, were guilty of inexcusable neglect. The test for inexcusable neglect is whether the conduct which brought about the default

was the act of a reasonably prudent person under the same circumstances. (*Jackson v. Bank of America* (1983) 141 Cal.App.3d 55, 58; see *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 895 ["The word 'excusable' means just that: inexcusable neglect prevents relief."].) One defendant is a certified public accountant while the other is a licensed realtor. Defendants were developers who became involved in a dispute over a construction project in Monterey Park, California. The trial court reasonably could have ruled that such licensed professionals acted with inexcusable neglect.

Further, the trial court could have concluded defendants were untruthful in their declarations. For example, Mr. Wan claims he does not understand the arbitration clause; something he agreed to. Further, Mr. Wan states that he does not understand English well enough to understand legal matters despite the fact he is a licensed realtor. And, Mr. Wan signed a declaration containing numerous legal terms written entirely in English. In addition, Mr. Lau, a certified public accountant, also claims he does not understand the arbitration clause; an assertion the trial court could, from my perspective, have reasonably rejected. On both inexcusable neglect and credibility grounds, the trial court reasonably could have denied the motion to set aside the defaults in my view.

TURNER, P. J.